

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition of Mid-Rivers Telephone	)	
Cooperative, Inc. for Order Declaring it to	)	WC Docket No. 02-78
be an Incumbent Local Exchange Carrier	)	
in Terry, Montana Pursuant to Section	)	
251(h)(2)	)	

**REPLY COMMENTS OF COX COMMUNICATIONS, INC.**

Cox Communications, Inc. (“Cox”)<sup>1</sup> hereby submits these reply comments in the above-captioned proceeding.<sup>2</sup> Cox agrees with the commenters who observe that the Mid-Rivers petition involves a specific fact pattern that raises unique policy issues, and Cox joins them in urging the FCC to consider Section 251(h)(2) requests on a case-by-case basis rather than attempting to craft rules of general applicability in this proceeding. Cox also agrees with the commenters who observe that whether to impose incumbent LEC obligations on competitive LECs pursuant to Section 251(h) is not the same issue as whether to relieve incumbent LECs of regulations under the forbearance provisions of Section 10. The two are subject to separate legal standards and raise separate policy considerations. Because the two inquiries are separate and distinct, the Commission also must ignore the suggestions of ACS and Qwest to use this proceeding to consider their proposed market-share-based tests for the removal of incumbent LECs’ Section 251 obligations and other dominant carrier regulation. This is not the appropriate

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<sup>1</sup> Cox is one of the largest competitive LECs, using its own facilities to serve over 1,200,000 residential and business customers in fifteen markets across eleven states.

<sup>2</sup> Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring it to be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2), *Notice of Proposed Rulemaking*, WC Docket No. 02-78, FCC-04-252 (rel. Nov. 15, 2004) (the “*Notice*”).

forum for those proposals, and, in any case, Qwest and ACS's proposals do not comport with the Communications Act's requirements.

**I. The Commission Should Review Section 251(h)(2) Requests on a Case-By-Case Basis.**

In the *Notice*, the Commission sought comment on whether it should craft generally applicable rules and standards to govern section 251(h)(2) petitions or whether it should continue to evaluate those requests on a case-by-case basis.<sup>3</sup> Cox agrees with those commenters who observe that each section 251(h)(2) petition presents a unique set of facts that requires individualized analysis.<sup>4</sup> These factual settings inevitably will present new and different policy issues, requiring the development of a separate record. Indeed, nine years after passage of the 1996 Act, the Commission still has considered only a few Section 251(h)(2) requests, each of which has presented significantly different issues, so there is little basis for generalizing at this time. Consequently, the Commission should continue to address Section 251(h)(2) petitions on a case-by-case basis with full notice and comment procedures.

In this proceeding, the Commission should limit itself to a determination of the issue squarely raised by Mid-Rivers's petition, i.e., whether it should be treated as an incumbent LEC in the Terry, Montana exchange, as it requests. At most, this proceeding should address the policy and regulatory implications directly raised by 251(h)(2) requests involving competitive LECs that have achieved overwhelming market share, operate in small rural markets, and are seeking incumbent LEC status. Any more generalized pronouncements would go beyond the

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<sup>3</sup> *Notice*, ¶ 18.

<sup>4</sup> Comments of General Communications, Inc. at 13-14 ("GCI Comments"); Comments of the Rural Independent Competitive Alliance at 7-8 ("RIAA Comments"); Comments of Iowa Telecom at 12-14; Comments of TCA, Inc. at 7.

factual record that has developed in this proceeding and would risk the creation of generally applicable standards that are not suitable for use in other situations. Indeed, no party has suggested anything more than the vaguest framework for generalized evaluations of requests for incumbent LEC status. If additional petitions similar to Mid-Rivers's continue to be filed, it may become appropriate, as the Commission gains experience with these issues, to adopt general rules and standards to provide guidance to competitive carriers considering requesting Section 251(h) treatment. The Commission has followed this approach in other situations, sometimes without later concluding that it needs to adopt general rules.<sup>5</sup> At this point, however, the Commission does not have sufficient experience to proceed with a more general approach.

**II. The Commission Must Keep Separate the Processes for Imposing Incumbent LEC Regulations on Competitive LECs Under Section 251(h)(2) and Relieving Incumbent LECs of Regulation Under Section 10.**

The Commission also sought comment on the future regulatory treatment of Qwest should the Commission grant Mid-Rivers's petition. Additionally, the Commission requested comment on the interplay of Section 251(h) requests and Section 10 forbearance.<sup>6</sup> Cox agrees with those commenters who observe that imposing incumbent LEC obligations on competitive LECs pursuant to Section 251(h) is a separate and distinct process from relieving incumbent LECs of regulations under the forbearance provisions of Section 10. The separate forbearance process requires the Commission to apply different legal standards and to evaluate questions that

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<sup>5</sup> *Compare Policies and Rules Governing Unauthorized Changes of Customers' Long Distance Carriers, Report and Order*, 10 FCC Rcd 9560 (1995) (adopting rules following adjudication of many complaints), *with Request of 25 Large Oceangoing Cargo Ships for Exemption from Radiotelegraph Requirements, Memorandum Opinion and Order*, 5 FCC Rcd 594, 595 (denying claim a rulemaking was required because determination was based on "the specific factual situations before us").

<sup>6</sup> *Notice* at 13-15.

are not germane to a Section 251(h)(2) petition, so there is no benefit to trying to complete both tasks in a single proceeding.<sup>7</sup> This conclusion is inescapable given the language of the Communications Act and the Commission's rules and precedents.<sup>8</sup> For instance, Section 10 calls for the Commission to make specific public interest findings that are not relevant to a Section 251(h)(2) determination.<sup>9</sup> Consequently, any relief for historic incumbent LECs must be based on the specific requirements of Section 10, and such determinations should be made independently of determinations concerning a new provider's status under section 251(h).

Keeping these proceedings separate also is entirely sensible given the important policy distinctions between a declaration that a competitive carrier should be treated as an incumbent and the forbearance from regulation of a historic incumbent LEC. In fact, it is entirely possible, as various commenters note, that the facts in individual cases might lead the Commission to decide to relieve an ILEC of regulatory obligations under Section 10 without then designating any other LEC in the market as an incumbent.<sup>10</sup> Conversely, as other commenters show, the facts may support incumbent LEC regulation for both the traditional incumbent and new incumbent carriers.<sup>11</sup> Thus the Commission should reject the argument that a determination of

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<sup>7</sup> RIAA Comments at 7; GCI Comments at 14-17.

<sup>8</sup> Compare 47 U.S.C. § 160 to 47 U.S.C. § 251(h) and Guam Public Utilities Commission Petition for Declaratory Ruling Concerning Sections 3(37) and 251(h)(2) of the Communications Act, *Declaratory Ruling and Notice of Proposed Rulemaking*, 12 FCC Rcd 6925 (1997).

<sup>9</sup> 47 U.S.C. § 160(a)(3), (b) (requiring specific findings that forbearance “will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services”).

<sup>10</sup> Comments of ACS of Anchorage, Inc., *et al.* at 5-6; Comments of Qwest Communications International, Inc. at 12-13; SBC Comments at 7.

<sup>11</sup> Comments of the Montana Public Service Commission at 9-10; RIAA Comments at 7. In either case, the Commission should make it clear that competitors' retail market share is not a

incumbency under Section 251(h) necessarily should relieve a traditional incumbent of incumbent LEC regulation.<sup>12</sup>

**III. The Commission Should Not Consider the ACS and Qwest Deregulation Proposals in this Proceeding.**

Qwest and ACS attempt to introduce broad deregulatory proposals that have nothing to do with whether Mid-Rivers should be treated as an incumbent LEC under Section 251(h). These proposals are far beyond the scope of this proceeding and should be dismissed for that reason alone. Moreover, there would be no basis for adopting these proposals even if they were properly before the Commission.

Qwest argues that the appropriate course for the Commission in this proceeding is to ignore the Communications Act and simply remove all Section 251 unbundling requirements or forbear from enforcing all incumbent LEC and dominant carrier regulation against Qwest without imposing any incumbent carrier requirements on Mid-Rivers.<sup>13</sup> Qwest suggests that the Commission can achieve this end either by declaring that incumbent LECs' unbundling obligations "simply go away" once an incumbent LEC has made a "straightforward showing of competition," or by exercising its Section 10 forbearance authority, even though there is no forbearance petition currently before the Commission for Terry, Montana.<sup>14</sup> These proposals are not appropriately raised here because they do not relate to the regulatory treatment of Mid-Rivers

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useful way to determine whether forbearance should be granted to historical incumbent LECs for the reasons described in other parties' comments. GCI Comments at 15-17.

<sup>12</sup> Iowa Telecom Comments at 11-14.

<sup>13</sup> Qwest Comments at 10.

<sup>14</sup> *Id.* at 9-15. The brief section of Qwest's comments devoted to a justification of forbearance does not meet the standards for a formal petition, as required by Section 10(c), and therefore should be dismissed out of hand.

and the Commission has no statutory authority to adopt either of Qwest's proposals in this proceeding.

Similarly, the Commission should ignore ACS's proposal to relieve any carrier of all dominant-carrier regulation when its retail market share falls below fifty percent.<sup>15</sup> This is not an appropriate issue for resolution in this proceeding, which involves only the request of a rural competitive LEC to assume incumbent LEC obligations pursuant to Section 251(h)(2). Indeed, ACS's proposal raises a host of thorny definitional and policy issues that cannot be brushed aside without a thorough inquiry and analysis. As just one example, in many cases competitive LECs – regardless of retail market share in their own service footprint – must continue to rely on the incumbent's ubiquitous network to reach many customers in a given market. That dependence does not vanish merely because the incumbent's retail market share dips below fifty percent and, in any event, an incumbent carrier with less than fifty percent retail market share still may be the indispensable party for interconnection in a fractionalized market. By removing incumbent LEC regulation and thereby eliminating many important competitive LEC network access rights without any meaningful analysis, adoption of ACS's proposal undoubtedly would diminish competition in many markets, not enhance it, in direct contravention of the express purposes of the 1996 Act. Thus, even if the Commission could properly address ACS's proposal in this proceeding, there would be no basis for adopting it.

### CONCLUSION

The issue properly before the Commission in this proceeding is whether to treat Mid-Rivers as an incumbent LEC under Section 251(h). For the reasons described above, the

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<sup>15</sup> ACS Comments at 2-5.

Commission should resist the entreaties of some of the commenters to expand this relatively narrow proceeding, which has produced a relatively sparse record, into a far-reaching order that could have unpredictable and unintended consequences for local competition in rural and non-rural markets alike. Cox respectfully requests that the Commission confine its decision to the Mid-Rivers petition that is properly before it and determine the related issues consistent with the foregoing discussion.

Respectfully submitted,

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